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CONTINUING LEGAL EDUCATION
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BOARD OF TRIAL ADVOCACY

K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
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99-00909

Re: Application of Memphis Network, LLC for a Certificate of Public Convenience and Necessity to Provide Interstate Telecommunications Services and Joint Petition of Memphis Light, Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLG&W") and A&L Network-Tennessee, LLC ("A&L") for Approval of an Agreement Between NLG&W and A&L Regarding Ownership of Memphis Network, LLC

Dear Mr. Waddell:

Enclosed please find the original and thirteen (13) copies of Post-Hearing Brief Filed on Behalf of Intervenor, International Brotherhood of Electrical Workers, Local 1288 and Findings of Fact and Conclusions of Law. If you have any questions, please feel free to contact me.

Very truly yours,

ALLEN, GODWIN, MORRIS,
LAURENZI & BLOOMFIELD, P.C.

LEE J. BLOOMFIELD
Attorney at Law

LJB:tdp

Enclosures

POSTED
11-20-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

NOV 17 11 42

EX-100-00909

IN RE:)
)
APPLICATION OF MEMPHIS)
NETWORKX, LLC FOR A CERTIFICATE)
OF PUBLIC CONVENIENCE AND)
NECESSITY TO PROVIDE INTERSTATE)
TELECOMMUNICATION SERVICES)
AND JOINT PETITION OF MEMPHIS)
LIGHT, GAS & WATER DIVISION,)
A DIVISION OF THE CITY OF)
MEMPHIS, TENNESSEE ("MLG&W"))
AND A&L NETWORKS-TENNESSEE,)
LLC ("A&L") FOR APPROVAL OF)
AN AGREEMENT BETWEEN MLG&W)
AND A&L REGARDING OWNERSHIP)
OF MEMPHIS NETWORKX, LLC.)

DOCKET NO. 99-00909

**POST-HEARING BRIEF FILED ON BEHALF OF
INTERVENOR, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 1288**

The International Brotherhood of Electrical Workers, Local 1288, (hereinafter "IBEW")
Intervenor in the above docket, pursuant to the Order of the Authority of October 19, 2000 submits
its post- hearing brief.

PRELIMINARY STATEMENT

This Brief addresses issues 1, 2, and 5 of the nine (9) issues in this Docket. As to the
remaining issues, as well as those additional issues raised in the Notice of Issues For Briefing dated
October 25, 2000, the IBEW adopts the brief submitted by Intervenor TimeWarner Telecom of the

FILED
11-20-00

Mid-South, L.P., Time Warner Communications of the Mid-South, and the Tennessee Cable Telecommunications Association.

ISSUE NO. 1

DOES APPLICANT MEET THE STATUTORY CRITERIA AND REQUIREMENTS SET FORTH IN TENN. CODE. ANN. SEC. 65-4-201, FOR A CERTIFICATE TO OPERATE AS A COMPETITIVE LOCAL EXCHANGE CARRIER IN TENNESSEE?

T.C.A. § 65-4-201(b) provides that no entity shall offer or provide any individual or a group of telecommunications services without first obtaining from the Tennessee Regulatory Authority (hereinafter “TRA”) a certificate of convenience and necessity for such service or territory. T.C.A. § 65-4-201(c) establishes the criteria for the issuance of a certificate. Such certificate can only be issued if, after examining the evidence the TRA finds: 1) that the applicant has demonstrated it will adhere to all applicable TRA policies, rules and orders; and 2) that the applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services. The IBEW respectfully submits that the applicant in this docket has failed with respect to both of these requirements.

First, the Applicant has failed to show that it will adhere to all applicable TRA policies, rules and orders. It is respectfully submitted that the past conduct of a party is highly indicative of a party’s future intent. A party’s future actions thus can be anticipated by its past behavior; and here the past conduct of the Applicant, in conjunction with that of the Joint Petitioners, is clearly indicative of an intent disregard this TRA’s policies and rules.

This past conduct includes:

- a) the involvement of Mr. Alexander Lowe, and his company, A&L Network-Tennessee (hereinafter “A&L”) in the RFP process, thereby giving him a competitive advantage over other parties, and thus tainting the process from the beginning. (Transcript of Proceedings, hereinafter referred to as “T.P.,” 7/20/00, page 71, lines 9-25, pages 72-77, page 78 lines 1-3);
- b) efforts to “slip” the \$20,000,000.00 inter-divisional loan past the Memphis City Council. (Ex. 22, 24);
- c) MLGW’s lack of good faith and candor in dealing with the public about the “expertise” of its partner, A&L, in the telecommunications business. (T.P., 10/16/00, page 37, lines 22-25, page 38, page 39, lines 1-8);
- d) lack of candor with the IBEW regarding the project. (T.P., 7/13/00, page 150, Lines 22-25, Page 151, Page 152); and
- e) attempts to withhold pertinent documents from public scrutiny. (T.P., 10/19/00, page 30, lines 25-25, pages 31-32, page 33, lines 1-2).

MLGW is a public entity, responsible to the citizens of the City of Memphis, and its action are subject to public scrutiny. A&L chose to partner with this public entity, and its actions as well as those of the Applicant should likewise be subject to public scrutiny. The Applicant and the Joint Petitioners, however, have shown a blatant disregard for openness and public candor. This is the conduct that can be expected by the Applicant in the future with regard to its adherence to the TRA’s rules, policies, and orders.

Second, it is submitted that the Applicant does not possess sufficient managerial, financial and technical ability to provide the applied for services. This fact is evidenced by the following:

a) it is admitted that neither MLGW nor A&L have any expertise in the telecommunications business. (T.P., 10/16/00, page 38, lines 23-25, page 38, page 39, line 1; pages 83-95);

b) A&L has limited financial resources, indicating lack of financial ability. (T.P, 9/12/00, page 117, line 19-25, page 118, line 1-19; T.P., 7/20/00. page 89, lines 23-25, page 90, page 91, lines 1-8;.Ex. 45);

c) MLGW did not see fit to conduct any independent studies, indicating its lack of managerial skills. (T.P., page 11, lines 14-25, pages 10-12, page 13, lines 1-9); and

d) The lack of candor on the part of the Applicant and Joint Petitioners, discussed above, indicates a lack of judgment that is further indicative of a lack of managerial skills.

Based upon the above evidence presented at the hearing of this matter, it is clear that neither the Applicant nor the Joint Petitioners possess sufficient managerial abilities in the area of telecommunications. MLG&W and A&L Networks-Tennessee, LLC have, at best, limited telecommunications experience. Memphis Networkx, LLC has absolutely no track record that would indicate that it has sufficient ability to establish and operate a \$130,000,000 telecommunications project. The Applicant and Joint Petitioners have simply failed to meet this criteria.

ISSUE NO. 2

WHETHER JOINT PETITIONERS AND APPLICANT HAVE COMPLIED WITH THE CRITERIA SET FORTH IN TENN. CODE. ANN. SEC. 7-52-103(d) AND WHETHER THE OPERATING AGREEMENT OF MEMPHIS NETWORKX, LLC, DATED NOVEMBER 8, 1999, ADOPTED BY MLG&W AND A&L SHOULD BE APPROVED BY THE TRA?

Pursuant to T.C.A. § 7-52-103(d), the Operating Agreement of Memphis Networx LLC dated November 8, 1999, must be approved by the TRA. This Agreement is between MLGW, a division of the City of Memphis, and a private entity. As recognized in the Memorandum of Understanding between the IBEW and MLGW, the City of Memphis owns and operates its electric, gas and water divisions. It is engaged in supplying services to the City's schools, parks, streets hospitals, and in serving the public, "these services being vital to the public health and welfare"

It is submitted that the TRA is charged with the responsibility of insuring that the Agreement, involving as it does such a such a vital public interest, is in the best interest of the citizens of Memphis and Shelby County, and MLGW's rate payers. It is submitted that the criteria for approval should therefore be more stringent than for an agreement between private parties. Based upon the evidence submitted this Agreement is not in the public interest.

First, it is clear that Mr. Lowe and A&L bring virtually nothing to the Agreement in terms of financial ability, telecommunications expertise, or managerial skills. (T.P., 9/14/00, page 131, lines 16-25, page 132; 10/16/00, pages 38, lines 4-25, page 39, lines 1-8, page 83, lines 21-25, pages 84-94, page 95, lines 1-19; Ex. 45). This is in contrast with the financial resources and good will that MLGW brings to the table. (T.P 10/16/00, pages 89, lines 5-12).

Second, the Agreement fails to adequately compensate MLGW, and ultimately its rate payers and the citizens of Memphis, for the value of its goodwill, customer base, and local knowledge. MLGW was created in 1939, and has enjoyed a good reputation for over 60 years. (T.P., 10/16/00, page 72, lines 17-25, page 73, lines 1-2). An examination of the Operating Agreement, however, shows that nothing is being paid for this goodwill.(T.P., 10/16/00, page 73, lines 3-8).

This Agreement is simply not in the best interests of the rate payers and citizens. It is respectfully submitted that the Agreement should not be approved by the TRA pursuant to T.C.A. § 7-52-103(d).

ISSUE NO. 5

TO WHAT EXTENT, IF ANY, IS MLG&W'S PARTICIPATION AS A MEMBER OF MEMPHIS NETWORKX, LLC, IN THE PROPOSAL TO OFFER TELECOMMUNICATIONS SERVICE AFFECTED BY ITS CHARTER OR THAT OF THE CITY OF MEMPHIS

IBEW respectfully submits that the MLG&W/City of Memphis Charter requires that this venture must be approved by the Memphis City Council. Section 681 of the MLG&W/City of Memphis Charter requires that contracts over \$5,000.00 be approved by the City Council. The City Council in 1985 passed Ordinance No. 3509, providing that, in lieu of approval of individual contracts and salaries, the City Council can approve the budget established by the MLG&W Board of Commissioners. On December 7, 1999, the Memphis City Council approved the MLG&W budget for the year 2000. This budget includes the electric division loan to the telecommunications division in the amount of \$20,000,000.00. MLG&W has argued that pursuant to Ordinance 3509, this approval was sufficient, and that individual contracts regarding the disbursement of the \$20,000,000.00 do not need to be approved.

IBEW respectfully submits, however, that this is contrary to the intent of Ordinance 3509. This ordinance obviously was intended to apply to contracts and salaries of MLG&W created in the normal course of its business operations, i.e. work contracts, purchase contracts, salaries, etc. The

obvious purpose of this ordinance was to alleviate the burdensome requirement of having every salary and contract approved by the City Council. This Ordinance does not apply, however, to a \$20,000,000.00 investment in a private entity with a private corporation, as is the case here. Such an investment is not in the normal course of business and, it is submitted, Ordinance 3509 does not apply to a contract of such a magnitude. Thus, Section 689 of the MLG&W/City of Memphis Charter applies to this venture and requires the approval of the City Council for the investment by MLG&W in Memphis Networx, as well as approval of the Operating Agreement.

Furthermore, the interdivisional loan of \$20,000,000.00 from the electric division to the telecommunications sub-division violates the provisions of § 689 of the MLG&W/City Charter. This provision provides as follows:

Notwithstanding any other provisions of this Act, the moneys and funds of any division (electric, gas and water) from time to time may be loaned to another division in such amounts and upon such terms as the board of light, gas and water commissioners may authorize and approve; provided, that no such loan shall be made by any division in excess of the principal sum of \$100,000.00, nor which will increase the aggregate principal amount of any loan or loans then owing to the lending division by the borrowing division to more than \$100,000.00, unless the board of commissioners of the City of Memphis shall first approve the same by resolution. (Priv. Acts, 1939, ch. 381, § 17)

As can be seen, § 689 provides that the City Council, by resolution, must specifically approve any interdivisional loan more than \$100,000.00. This approval did not occur in the instant case. The \$20,000,000.00 loan was merely a line item of the overall budget that was approved by the City Council. The above Charter provision requires that such a loan be approved by a specific resolution, not just as a line item in a budget.

At first blush it would appear that § 689 has been amended by Ordinance No. 3054. This ordinance states that: "Notwithstanding any provision of the Charter, the monies and funds of any

division may be loaned to another division in such amounts and upon such terms as the Board of Light, Gas and Water Commissioners may authorize and approve.” This provision would seem to allow the joint venture without the approval of the City Council. As evidenced by the preamble of Ordinance No. 3055, however, it was passed to modernize MLG&W and add flexibility in its organization to deal with new energy systems, such as artificial gas, solar, etc. This ordinance, therefore, dealt with energy systems, and was the proper and only context in which the allowance of interdivisional loans by the ordinance must be placed. Since the interdivisional loan in this matter was for purposes of going into the telecommunications business with a private entity, not for the creation of new energy sources or energy systems, these provisions do not override those of § 689, which require such interdivisional loans above \$100,000.00 to be approved by a resolution of the City be approved by a resolution of the City Council.

The so-called approval of \$20,000,000.00 interdivisional loan by the City Council when it approved the overall budget of MLG&W was questioned by at least one member of the City Council. In a letter written March 24, 2000, by Mr. Brent Taylor, Chairman, General Services and Utilities Committee, to Larry Thompson, Councilman Taylor states:

Tuesday, the members of the General Services and Utilities Committee received a copy of a light, gas and water document that appears to indicate some intention on the part of the division to ‘slip’ the \$20,000,000.00 loan by the Council. As Vice Chairman of the General Services and Utilities Committee last year and as Chairman this year, as I recall, representatives of light, gas and water did not make the Council aware of this significant expenditure of public funds during the budgeting process. In fact, to my knowledge, Council was not made aware of the Memphis Networx project (other than what we read in the newspaper) until we received the franchise application in January, 2000. . . .

As the Council continued to consider this, and as you are not aware, several Committee members have expressed serious concerns that the nature, scope and terms of this project, and the manner in which it has been presented.

(Exhibit 24).

Based upon the above, it is respectfully submitted that the \$20,000,000.00 loan, as well as the entry by MLG&W into the joint venture and the Operating Agreement, should have been approved by the City Council. As this approval was not obtained, these actions are ultra vires acts.

CONCLUSION

Based upon all of the above, it is the position of the IBEW that the Application of Memphis Networx, LLC, for a Certificate of Convenience and Necessity should be denied. Furthermore, the Joint Petition of MLGW and A&L Networks-Tennessee, LLC, for approval of the Operating Agreement dated November 8, 1999, should likewise be denied.

Respectfully submitted,

ALLEN, GODWIN, MORRIS,
LAURENZI & BLOOMFIELD, P.C.
200 Jefferson Avenue, Suite 1400
Memphis, Tennessee 38103
(901) 528-1702

BY: 

LEE J. BLOOMFIELD #8851

CERTIFICATE OF SERVICE

I, Lee J. Bloomfield, do hereby certify that on May 5, 2000, a copy of the foregoing document was served on the parties of record listed below via facsimile and U.S. Mail, postage prepaid, first class.

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Nashville, TN 37201-3300



LEE J. BLOOMFIELD

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:)
)
APPLICATION OF MEMPHIS)
NETWORK, LLC FOR A CERTIFICATE)
OF PUBLIC CONVENIENCE AND)
NECESSITY TO PROVIDE INTERSTATE)
TELECOMMUNICATION SERVICES)
AND JOINT PETITION OF MEMPHIS)
LIGHT, GAS & WATER DIVISION,)
A DIVISION OF THE CITY OF)
MEMPHIS, TENNESSEE ("MLG&W"))
AND A&L NETWORKS-TENNESSEE,)
LLC ("A&L") FOR APPROVAL OF)
AN AGREEMENT BETWEEN MLG&W)
AND A&L REGARDING OWNERSHIP)
OF MEMPHIS NETWORK, LLC.)

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DETECTIVE SECRETARY

DOCKET NO. 99-00909

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW the Intervenor, International Brotherhood of Electrical Worker's, who hereby submits the following Findings of Fact and Conclusions of Law. In addition to these findings and conclusions, the IBEW adopts and incorporates herein the findings of fact and conclusions of law submitted by Intervenors Time Warner Telecom of the Mid-South, L.P., Time Warner Communications of the Mid-South, and the Tennessee Cable Telecommunications Association.

I.

FINDINGS OF FACT.

1. The International Brotherhood of Electrical Workers Local 1288 (hereinafter "IBEW") represents the non-management, bargaining unit employees of Memphis Light, Gas & Water (hereinafter "MLG&W"). (Transcript of Proceedings, hereinafter "T.P.," 9/13/00, page130, lines 12-13).

2. There are approximately 1,700 non-management bargaining unit employees of MLG&W. (T.P., 9/13/00, page 130, lines 14-17).
3. Approximately 1,200 of the non-management bargaining unit employees are IBEW members. (T.P., 9/13/00, page 130, lines 19-20).
4. Labor relations between MLGW and it's bargaining unit employees are governed by a Memorandum of Understanding, which expires on January 1, 2001. (T.P., 9/13/00, page 132, lines 12-17).
5. The current President of the IBEW is Brent E. Hall. (T.P., 9/13/00, page 130, lines 3-10).
6. Mr. Hall's duties as President of IBEW are to bargain and conduct business on behalf of the bargaining unit employees. (T.P., 9/13/00, page 130, lines 24-25, page 131, line 1).
7. At a meeting held on January 22, 1999, Mr. Hall was advised by Mr. Wade Stinson of MLG&W that MLG&W had put out a Request for Proposal (hereinafter "RFP") and would go into telecommunications. (T.P., 9/13/00, page 137, lines 1-8).
8. In this January 22, 1999 meeting Mr. Hall was led to believe that MLG&W's entry in the telecommunications business would be done on an "in-house" basis, and that the Memorandum of Understanding would allow IBEW employees certain rights to enter into the new telecommunications division. (T.P., 9/13/00, page 137, lines 9-19).
9. On June 2, 1999, a meeting was held between representatives of the IBEW and MLG&W. At this meeting Mr. Larry Thompson of MLG&W discussed the RFP for telecommunications. (T.P., 9/13/00, page 137, lines 20-25, page 138, lines 1-5).
10. As the result of this meeting the IBEW through Mr. Hall was under the impression that the work was going to be "in-house". (T.P., 9/13/00, page 139, lines 2-8, lines 15-19).

11. IBEW was never notified by officials of MLG&W that they were going to take the joint venture for approval by the Board of Commissioners of MLG&W. (T.P., 9/13/00, page 140, lines 22-25, page 141, line 1).
12. The first indication that IBEW officials had that MLG&W was going to partner with A&L Networks-Tennessee, LLC (hereinafter "A&L"), was through newspaper articles that appeared in Memphis beginning in August, 1999. (T.P., 9/13/00, page 141, lines 3-8).
13. Brent Hall never received a copy of the Operating Agreement between MLG&W and A&L dated November 8, 1999, directly from any MLG&W Official. (T.P., 9/13/00, page 141, lines 6-10).
14. The IBEW expressed interest in doing telecommunications work only if the work was to be done "in-house". (T.P., 9/13/00, page 143, lines 20-25).
15. The Division Digest is a newsletter published by MLG&W that is received by the employees with their paychecks every two weeks. (T.P., 9/13/00, page 144, lines 17-25).
16. The Division Digest is written by the Corporate Communications Department of MLG&W. (T.P., 9/13/00, page 144, line 25, page 145, lines 1-2).
17. The May 12, 2000 Edition of the Division Digest stated that an agreement had been reached between the intervening parties in this matter. (T.P., 9/13/00, page 147, lines 4-22).
18. This statement was inaccurate and is reflective of the attitude that MLG&W displayed to the IBEW regarding it's role in this matter. (T.P., 9/13/00, page 148, lines 1-25, page 144, lines 1-6).
19. MLG&W did not act in good faith towards the IBEW with respect to this project. (T.P., 9/13/00, page 150, lines 22-25, page 151, page 152).

20. Article 17 of the Memorandum of Understanding provides that senior qualified employees of MLGW will be considered for promotions to new positions and to vacancies covered under the Memorandum of Understanding prior to considering applicants from outside MLGW. (T.P., 9/13/00, page 154, lines 24-25, page 155, lines 1-11).
21. If the telecommunications business was done as an “in-house” project, Article 17 of the Memorandum would apply to certain jobs created by the telecommunications division. (T.P., 9/13/00, page 155, lines 12-25, page 156, lines 1-16).
22. New jobs will be created by the telecommunications project that are covered by the Memorandum. (Pre-filed Testimony of Brent E. Hall, Page 6).
23. At the end of phase three of the project, 500-1000 jobs will be created, a good number of which would be covered by the Memorandum of Understanding if the project was done in-house. (T.P., 10/16/00, pages 160-161, page 162, lines 1-3).
24. IBEW has concerns that if the Memphis Networks venture is approved, current bargaining unit employees will be taken away from essential services provided by MLG&W, and the shortage will be filled by MLG&W by contracting the work to a private company, thus eliminating bargaining unit jobs. (Pre-trial Testimony of Brent Hall, Pages 6-7).
25. Mr. Alexander Lowe, and his company, A& L was involved in the RFP process, thereby giving him a competitive advantage over other parties. (Transcript of Proceedings, hereinafter referred to as “T.P.,” 7/20/00, page 71, lines 9-25, pages 72-77, page 78 lines 1-3).
26. MLGW attempted to slip a \$20,000,000.00 inter-divisional loan from the electric division to the telecommunications sub-division past the Memphis City Council. (Ex. 22, 24).

27. MLGW's was not candid in dealing with the public about the expertise of its partner, A&L in the telecommunications business. (T.P., 10/16/00, page 37, lines 22-25, page 38, page 39, lines 1-8).
28. MLGW attempted to withhold pertinent documents from public scrutiny. (T.P., 10/19/00, page 30, lines 25-25, pages 31-32, page 33, lines 1-2)
29. Neither MLGW nor A&L have any expertise in the telecommunications business. (T.P., 10/16/00, page 38, lines 23-25, page 38, page 39, line 1; pages 83-95).
30. A&L has limited financial resources. (T.P., 9/12/00, page 117, line 19-25, page 118, line 1-19; T.P., 7/20/00, page 89, lines 23-25, page 90, page 91, lines 1-8; Ex. 45).
31. MLGW did not conduct any independent studies of the telecommunications project. (T.P., page 11, lines 14-25, pages 10-12, page 13, lines 1-9).
32. MLGW was created in 1939, and has enjoyed a good reputation for over 60 years. (T.P., 10/16/00, page 72.).
33. The Operating Agreement of November 8, 1999, fails to adequately compensate MLGW and ultimately its rate payers and the citizens of Memphis, for the value of its goodwill, customer base, and local knowledge. (T.P., 10/16/00, page 73).

II.

CONCLUSIONS OF LAW.

1. Memphis Networkx, LLC, has not demonstrated that it will adhere to all applicable TRA policies, rules, and orders, as required by T.C.A. § 65-4-201 (c)(1).

2. Memphis Networx, LLC, does not possess sufficient managerial abilities to provide the applied for services, as required by T.C.A. § 65-4-201 (c)(2).
3. Memphis Networx, LLC, does not possess sufficient financial abilities to provide the applied for services, as required by T.C.A. § 65-4-201 (c)(2).
4. Memphis Networx, LLC, does not possess sufficient technical abilities to provide the applied for services, as required by T.C.A. § 65-4-201 (c)(2).
5. The Application of Memphis Networx, LLC, for a Certificate of Convenience and Necessity should be denied.
6. The Operating Agreement dated November 8, 1999, between MLGW and A&L is not in the best interest of the citizens of Memphis, the ratepayers of MLGW, or the public in general.
7. The Joint Petition of MLGW and A&L Networks-Tennessee, LLC, for approval of the Operating Agreement dated November 8, 1999, should be denied.

Respectfully submitted,

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BY: 

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CERTIFICATE OF SERVICE

I, Lee J. Bloomfield, do hereby certify that on May 16th, 2000, a copy of the foregoing document was served on the parties of record listed below via facsimile and U.S. Mail, postage prepaid, first class.

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